Supreme Court, U.S.
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No. 00-1462

In the
Supreme Court of the United States

ADRIENNE MARSH LEFKOWITZ,

Petitioner,

v.

THE BANK OF NEW YORK, et al.,

Respondents,

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New York

REPLY TO BRIEFS IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

ARGUMENT 1

I. THE ISSUE OF THE CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE HEARING 1

A. The Arguments Were Adequately Preserved 1

B. There Was Objection And No Acquiescence 3

C. This Hearing Was Constitutionally Defective 5

D. The Issues Raised Are Compelling 8

II. THE AWARD OF $250,000 IN ATTORNEY FEES WITHOUT NOTICE OR A HEARING 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Estate of Burns, 130 Misc.2d 317 (Surr. Broome, 1985) affirmed,126 A.D.2d 809 (3d Dept. 1987) 10

Estate of Marsh, N.Y.L.J. 10/12/95, p. 29 4

Estate of Marsh, N.Y.L.J., 3/16/98, p. 27 4

In re Luckenbach's Estate, 189 Misc. 529 (N.Y.Sur. 1947) 7

Logan v. Zimmerman Brush Co., 455 U.S.422, 102 S.Ct. 1148 (1982) 3

Matter of Dillon, 28 N.Y.2d 57 (1971) 9

Matter of Estate of Campbell, 138 A.D.2d 827 (3d Dept. 1988) 9

Matter of Urbach, 252 A.D.2d 318 (3d Dept. 1999) 9

Matthews v. Eldridge, 424 U.S. 319 (1976) 7

Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971) 6

Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) 3

Steck v. Colorado Fuel and Iron Co., 142 N.Y.236 (1894) 7

United States v. Deglomini et al., 111 F.Supp.2d 198 (E.D.N.Y. 2000) 10

United States v. Raddatz, 447 U.S. 667 (1980) 8

Will of Marsh, 179 A.D.2d 581 (1st Dept. 1992) 4

STATUTES:

CPLR §4212 7

CPLR §4317(b) 7

CPLR §4321(1) 4

Jud. Law §290 5

SCPA §506 ..... 1, 2, 3, 7

SCPA §506(i) 3

SCPA §506(3) 4

SCPA §506(4) 5, 6

ARGUMENT

Only BNY[1] filed objections to petitioner's accounting although the Fines and Mrs. Appelbaum received citations. The Fine and Appelbaum submissions to the trial court and the Appellate Division were addressed only to the fee petitions of Shea & Gould and Greene & Zinner. Thus all respondents except BNY have waived their rights to argue on any issue except that regarding the $250,000 in fees. Lest the Court consider all the briefs on all issues, they will be addressed as space allows.

I. THE ISSUE OF THE CONSTITUTIONAL DEFECTS IN SCPA §506 AND IN THE HEARING

A. The Arguments Were Adequately Preserved

The issue of the adequacy of the argument below is distinct from the issue of preserving the argument. An argument may seem unconvincing but nevertheless may preserve the issue. It is for this Court and not respondents to determine whether a federal question was preserved and then whether it is adequately argued. (See Pet. p. 3)

Significantly neither the New York Court of Appeals nor Appellate Division ruled that the issues were not preserved. (Nor did respondents cross-appeal that or any issue.) "No substantial constitutional question" is not synonymous with dismissal on the grounds that the issue was not preserved.

The Respondents' arguments about notice to the New York State Attorney General are also without merit. Petitioner first

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[1] "BNY" refers to The Bank of New York. "JMI" refers to Joseph Markovits, Inc. "MFDDS" refers to estate counsel McCarthy, Fingar, Donovan, Drazen & Smith. References to Petitioner's March 19, 2001 Petition to this Court will be denoted as "Pet. p. ___." References to BNY's brief in opposition will be denoted hereafter as "Redis p. ___." References to the brief in opposition for the Fines will be denoted hereafter as "Fine p. ___." References to the brief in opposition by Greene & Zinner will be denoted hereafter as "G & Z p. ___." See also footnote 5 on Pet. p.5. The BNY corporate disclosure statement is at Pet. p. vi.

gave notice when required to do so by the Rules of the Court of Appeals. (Mr. Redis' speculation on the course chosen by petitioner is wrong. She preferred leave to appeal on all issues, not just the constitutional ones.) The statutes BNY and Fine rely on refer to notice to be given by the courts or actions to be taken on their initiative. Even when the New York State Attorney General *was* notified he did not appear nor did he object to lack of earlier notification. Nor is this issue relevant to constitutional infirmities in the hearing or the application of SCPA §506.

Even BNY cannot refute that petitioner cited cases on due process law. The Siegel quote on Pet. p. 17 was used in petitioner's argument *to the trial court*. Mr. Redis quoted only one *part* of the argument to the Appellate Division. Indeed on p. 61 alone petitioner had argued to the Appellate Division:

> "This appeal raises the issue of the legality, indeed the constitutionality, of the appointment of a Referee to Hear and Report, *sua sponte* by the Surrogate, generating large expenses to the parties and estate and denying access to a duly constituted judge of the court, without consent of appellant, in a substantial matter involving millions of dollars. If SCPA §506 permits such appointments it is constitutionally invalid.

Petitioner then quoted Prof. Siegel on the constitutional issue. This was followed by extensive examples of the defects to the hearing such as the payment before filing the Report and *ex parte* conferences. On p. 64 petitioner began an exposition on other aspects of the hearing which "also denied appellant her constitutional rights to due process and a fair hearing," one key aspect of which was precluding a live court report (p. 65). Other examples were allowing a partner of Mr. Redis to sit at the counsel table even though he was a key witness, the

Referee's various misrepresentations to petitioner (p. 68), and failure to allow any hearing at all on several issues (p. 69).[2] In fact the recitation at Fine pp. 9-11 lists additional examples of petitioner's preservation of constitutional issues.[3]

As noted on Pet. p. 17 the constitutional challenges were first raised to the trial court (Cf. Fine p. 7). That the Appellate Division did not use precise constitutional language is not dispositive. (See quotation on Pet. p. 4.)

B. There Was Objection and No Acquiescence

BNY must be conceding that consent was necessary when it erroneously argues petitioner "consented" by participation. The case cited by BNY is inapposite because it is unrefuted that petitioner timely objected to the reference. The order appointing the Referee (39a)[4] was an interim order and not a

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[2] On p. 69 of the brief petitioner also argued to the Appellate Division: "Under all these circumstances it is clear the appellant was denied her constitutional right to a fair hearing and her property was taken from her without due process of law. The due process requirements of the Fifth and Fourteenth Amendments apply to state laws. Where state law is inconsistent with federally guaranteed rights the federal rights are controlling. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S.422, 432, 102 S.Ct. 1148 (1982); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Accordingly the decree should be vacated."

[3] Mr. Redis conspicuously omitted the heading of the section of the brief that includes pp. 61 to 69: "Appellant Was Denied Her Constitutional Right to a Fair Hearing Before an Appropriate Tribunal" (p. 57)

[4] Redis p. 16 claims petitioner did not "even include a copy of the Order in her Appendix to the Petition." This is but one of many misstatements made in BNY's submission. In a 10-page reply to multiple answers there is not sufficient space to address all the errors. However, a few more egregious examples will be addressed. On Redis p. 8 he stated: "The Petitioner also mischaracterizes the legal status of the Referee appointed under SCPA §506(i)." This is ludicrous. Not only is SCPA §506 titled "Reference to hear and report" and printed at 46a, but on Pet. p. 14 petitioner argued that it is the Surrogate that is the decision maker but was "unfamiliar with the facts and ignored key stipulations". On Pet. p. 16 petitioner specifically described the Referee as one to hear and report. Finally, the Siegel quote on Pet. p. 17 specifically discusses references "to report".

final order. Thus the appropriate time to appeal it was in the

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BNY also takes issue with petitioner's assertion that the referee was paid $108,358.50 before he issued his report. (Cf. Pet. pp. 10 & 17.) The Petition is not misleading. The Referee sought payment by motion (without citations or order to show cause). While the Surrogate determined his hourly rate (and first portion of his fees), she did not order the payment be made *before* the Report was submitted. Respondent Appelbaum's argument on G & Z p. 7 is illogical. The prior order appointing the Referee (Pet. p. 39a) failed to set forth his hourly rate or who would pay it, contrary to CPLR §4321(1). Moreover, the Surrogate would not have known the Referee would delay his Report until December 1995 in violation of SCPA 506(3). Thus the Court order corrected the omissions from the order appointing the Referee. It was not a license to violate longstanding New York law. Nor does length of the proceeding provide grounds to violate the law. The integrity of the hearing is violated by prepayment irrespective of the length of the hearing. The Referee sought the payment from BNY by letter and received a check by return letter. Petitioner was never copied on either letter. She later learned of the clandestine payment during discovery for another proceeding. After petitioner objected to the clandestine payment, a subsequent order (*Estate of Marsh*, NYLJ, 3/16/98 p. 27, see also NYLJ, 5/21/97 p. 28) instructed that the later fee be paid *after* the Referee concluded his duties.

BNY repeatedly (at Redis pp.3, 5, 6 and 16) refers to petitioner as an attorney but omits the fact that petitioner has never practiced law. BNY also states on p. 6: "I [sic] previously discussed the Petitioner's misstatement that she was financially unable to afford counsel at the hearing ..." Yet BNY withheld petitioner's share of the first substantial estate distribution and paid it only under court order *(Estate of Marsh*, NYLJ 10/12/95, p. 29) in October 1995. This was after the 1994 hearing and 1995 post-trial submissions to the Referee. (*BNY continues to seize petitioner's distributions from both her parents' estates despite payment of the 1998 and later assessments.*)

Finally, it is necessary to briefly respond to BNY's extensive digression to the litigation related to the Marsh estate. Petitioner was indeed sanctioned by Surrogate Preminger in 1993 for an order to show cause for disqualification of MFDDS and/or its attorney Streng from *this* accounting proceeding. An earlier disqualification motion in 1990 in the course of the probate proceeding had been denied during a hasty and incomplete hearing. See *Will of Marsh*, 179 A.D.2d 581 (1st Dept. 1992) describing the strewing of petitioner's files by attorney Streng as he searched her office. The 1993 effort to disqualify MFDDS related to the fact that Mr. Streng was to be (and was) a key witness at the 1994 accounting hearing.

As to motions to recuse Surrogate Preminger (Redis p. 2), petitioner learned inadvertently that the Surrogate was co-authoring a book with one of petitioner's adversaries during the accounting proceeding. (A-4940)

Finally, the 1998 decree at issue is an accounting decree, not a probate decree. The probate decree was issued in 1992. (Cf. Redis pp. 3, 4 and 8.)

context of the final order, as occurred in the case at bar. Nor was a stay a viable alternative. Indeed petitioner had no choice but to participate in the hearing lest she lose all her rights. BNY's argument is without merit as is its argument that petitioner sought "affirmative relief." It is preposterous to think that petitioner would not submit motions and applications during the accounting proceeding. To do otherwise might risk a default. Indeed, unless a motion is timely made to the Surrogate, the Referee's Report would be deemed confirmed. SCPA §506(4). (See 47a)

C. This Hearing Was Constitutionally Defective

On Redis p. 13 BNY argues that: "Petitioner must demonstrate that she did not receive notice reasonably calculated to apprise her of the actions and relief sought and to afford her an opportunity to be heard" to be deemed to have been denied "due process". It is true that without proper notice and an opportunity to be heard there is no due process. However, it is not true that reasonable notice and opportunity to be heard are the only requirements of due process.

It cannot be refuted that the hearing transcripts were defective to the point of misidentifying the speaker (See Pet. p. 19 and A-2569-2631). Because the Surrogate did not conduct the hearing herself the transcripts and documentary evidence were her only direct links to the hearing. In fact, insofar as petitioner's accounting, the Surrogate only deviated from the Referee's Report by modifying the objection regarding the Hong Kong estate duty penalty. (A difference of about $13,000.) In this *one and only deviation* from the Referee's Report the Surrogate had documentary proof of communications to and from the Hong Kong Inland Revenue Department on which to rely. (See last 10 lines of long paragraph of Pet. 35a.) (While G&Z p. 9 takes issue with reliance on Jud. Law §290 as not in effect in 1994, under that

argument there was *no* authority for using mechanical transcription.)

There were no reliable transcripts on which petitioner or the Surrogate or appellate courts could rely. Thus there could be no effective independent determination by the Surrogate except where the documentary evidence was clear cut. Cases are legion that transcripts are crucial to effective appeals. So too were they critical for the Surrogate to make an independent determination. Thus the absence of reliable transcripts denied petitioner a fair hearing or effective review by the Surrogate or appellate courts.

The Fine arguments on Fine pp. 14 and 16 lack merit. The Report is automatically deemed confirmed in the absence of motions. SCPA 506(4). Moreover, appellate review is not a substitute for a fair trial. If it were, no case would ever have to go beyond the first level of appellate review. Nor is a lengthy hearing necessarily a fair one, particularly where the referee was paid by the hour.

A proceeding in which the decider of fact did not conduct the hearing and does not even have reliable transcripts to reflect the testimony accurately does not pass constitutional muster. See also Pet. pp. 13-15, 17-20. petitioner had repeatedly argued that the inadequate transcripts and refusal to permit her transcriber to make an unofficial transcript denied petitioner due process. This Court has itself emphasized the importance of adequate transcripts to due process. See, e.g., *Mayer v. Chicago*, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed. 2d 372 (1971).

The issues in the accounting did not call for a lawyer with expertise in labor law. The key issues required expertise in trusts and estates law, which the referee lacked. Clearly the appointment of a labor lawyer contradicts BNY's "complexity" argument. *Nor was this a long account.* In fact the account covered a mere 21 months. The fact remains that the Referee

was not a special master. Nor was this an advisory jury.[5] The cases dealing with appointments made in years prior to the enactment of SCPA 506 are irrelevant. The appointment was made on the basis of the wealth of the estate and was a patronage appointment.[6] In fact *Steck v. Colorado Fuel and Iron Co.*, 142 N.Y.236 (1894), cited by BNY, indicates references without consent are disfavored in New York. *(In re Luckenbach's Estate*, 189 Misc. 529 (N.Y.Sur. 1947) is inapposite. Not only does it predate the enactment of SCPA 506, but it involves the examination of the accounting party, not the post-objection hearing phase of an accounting.)

Matthews v. Eldridge, 424 U.S. 319 (1976) relied on at Fine p. 13[7] is inapposite since it dealt with adequate administrative proceedings within the Social Securities Administration. However, even under the *Matthews v. Eldridge* standard the hearing was constitutionally defective. At least $2,000,000 and petitioner's reputation were the implicated interests. There was a huge risk of an erroneous determination because of the process used (particularly with defective transcripts). Indeed petitioner recited some of the errors at Pet. p.14-15. Had the court followed the usual procedure the errors would have been avoided as would the issue of prepayment of a referee. The public (and IRS) interest in avoiding prolonged

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[5] CPLR 4212 cited at G&Z p. 4 is for advisory juries and exceptional circumstances. An order under this rule must specify the issues to be submitted. CPLR 4317(b) is only for long accounts. Moreover it is superceded by SCPA 506. There no longer are references to determine in Surrogates Court.

[6] There has been extensive commentary about patronage in the New York Surrogates Courts. See, e.g., *N.Y. Times* editorials 5/26/00 and 6/13/00.

[7] The Fines err on Fine p. 15. petitioner was ordered to undergo an accounting proceeding at the Surrogate's Court. She had to submit to the adjudication. Thus the state did exclusively control the legal relationship.

defective hearings that trigger delay and further litigation had been cited by the Surrogate herself (Pet. p. 16). *United States v. Raddatz*, 447 U.S. 667 (1980) is also inapposite. It involved a magistrate who decided *a motion*, not the ultimate trial. Moreover, in *Raddatz*, there were reliable transcripts and no equal protection issues. Nor was the magistrate's objectivity clouded by a prepayment.

D. The Issues Raised Are Compelling

Respondents' briefs are dismissive of the significance of the issues presented by this petition. However, at $300,000 and up per estate, the amounts lost by the IRS as well as estates are enormous. Moreover, *if this petition is not granted*, the decisions below will stand and be the law that unsworn referees may be imposed over opposition, be paid by one party before submission of the report, deny a litigant a reliable transcript, and flagrantly violate numerous New York statutes. Moreover, where "wealthy" estates are subjected to lengthier, extraordinarily expensive, more burdensome yet less effective procedures, there is a serious constitutional violation. This indeed may be a case of first impression invoking the classification of "the wealthy" as opposed to the impoverished, yet both are categories of classification according to economic means. Finally, since the $250,000 for attorney fees were awarded on motion without notice or a hearing, if this petition is not granted a license will be created to dispense with notice and hearings in reallocating estate interests.

II. THE AWARD OF $250,000 IN ATTORNEY FEES WITHOUT NOTICE OR A HEARING

Only respondent Appelbaum opposed this portion of the Petition. There is no doubt that this due process issue was properly preserved and pressed at the first opportunity. The argument on G&Z p. 2 ignores Pet. p. 17 and all the references to the appellate appendix, which indicate issues were preserved

at the trial court level, at Pet. p. 52a *et seq*.

The decree incorporates this fee issue. Since it is indisputable that petitioner was denied due process on the fee issue, the entire decree is invalid.

The cases on G&Z p. 12 are of no assistance to respondent. In the disciplinary case(s), valid transcripts were available and the use of special referees was routine. (The Appellate Courts are not trial courts.) Here the Surrogate has violated principles of equal protection by imposing the referee on the basis of wealth of the estate.

The argument on G&Z p. 17 is of no avail to respondent. Here the fee petitions were the pleadings, and functioned as the stipulations did in *Matter of Estate of Campbell*, 138 A.D.2d 827 (3d Dept. 1988) to limit the relief available - recovery from the general assets of the estate.

The fees sought were related to the 1990 removal, which is not considered an enlargement of an estate. Moreover, Mr. Ball conceded in 1994 that his firm had not increased the estate. (A-408). Greene & Zinner's assertion that it identified additional estate assets should have been subject to a formal hearing to dispute its self-serving claim.[8] More important are the $4,000,000 loss at JMI in 1990 following the takeover and

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[8] The Greene & Zinner Brief contains too many errors to address in limited space. *Inter alia*: The loan sought in 1990 was not from outside investors but from a Hong Kong company owned 50% by the estate (Cf. G&Z p. 15). The fee petitioners did *not* participate in the 1994 accounting hearing (Cf. G&Z p. 18). Footnote 11 is incorrect. This was the first time petitioner's estate interest was charged. However, *BNY is currently seeking an additional $1 million from petitioner's estate interest despite the release in the decree. (Pet. p. 25a). Matter of Dillon*, 28 N.Y.2d 597 (1971) and *Matter of Urbach*, 252 A.D.2d 318 (3d Dept. 1999) make clear that an SCPA §2010 fee proceeding (as these were) may not be used to award payment from a beneficiary's interest in the estate to an opponent. There were less than 3 days spent on the 3 fee hearings (Cf. G&Z p. 21). They were defended by MFDDS since the fees were sought from the general assets of the estate.

later retainer of an accountant, Thomas Borek, for JMI with ties to organized crime. *Cf. United States v. Deglomini et al.*, 111 F.Supp.2d 198, 199 (E.D.N.Y. 2000). Because the net effect of the firms' work diminished the estate, and because there was no notice or hearing in the case at bar *Estate of Burns*, 130 Misc.2d 317 (Surr. Broome, 1985) is inapposite.

In G&Z footnote 2 p. 5, respondent argued that "an appraisal of the totality of facts in a given case is the appropriate test of whether due process has been denied." No respondent disputed that the stipulations were ignored or that the Surrogate made serious errors, or that the transcripts were so bad that they even misidentified the speakers. No respondent took issue with the recitation on Pet. p. 9 (other than BNY's claim that the $13 million appraisal was too high). The totality of the circumstances in the case at bar makes clear that due process was denied and petitioner did not receive a fair hearing. And in the matter of the $250,000 for attorney fees, there was no notice or hearing at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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